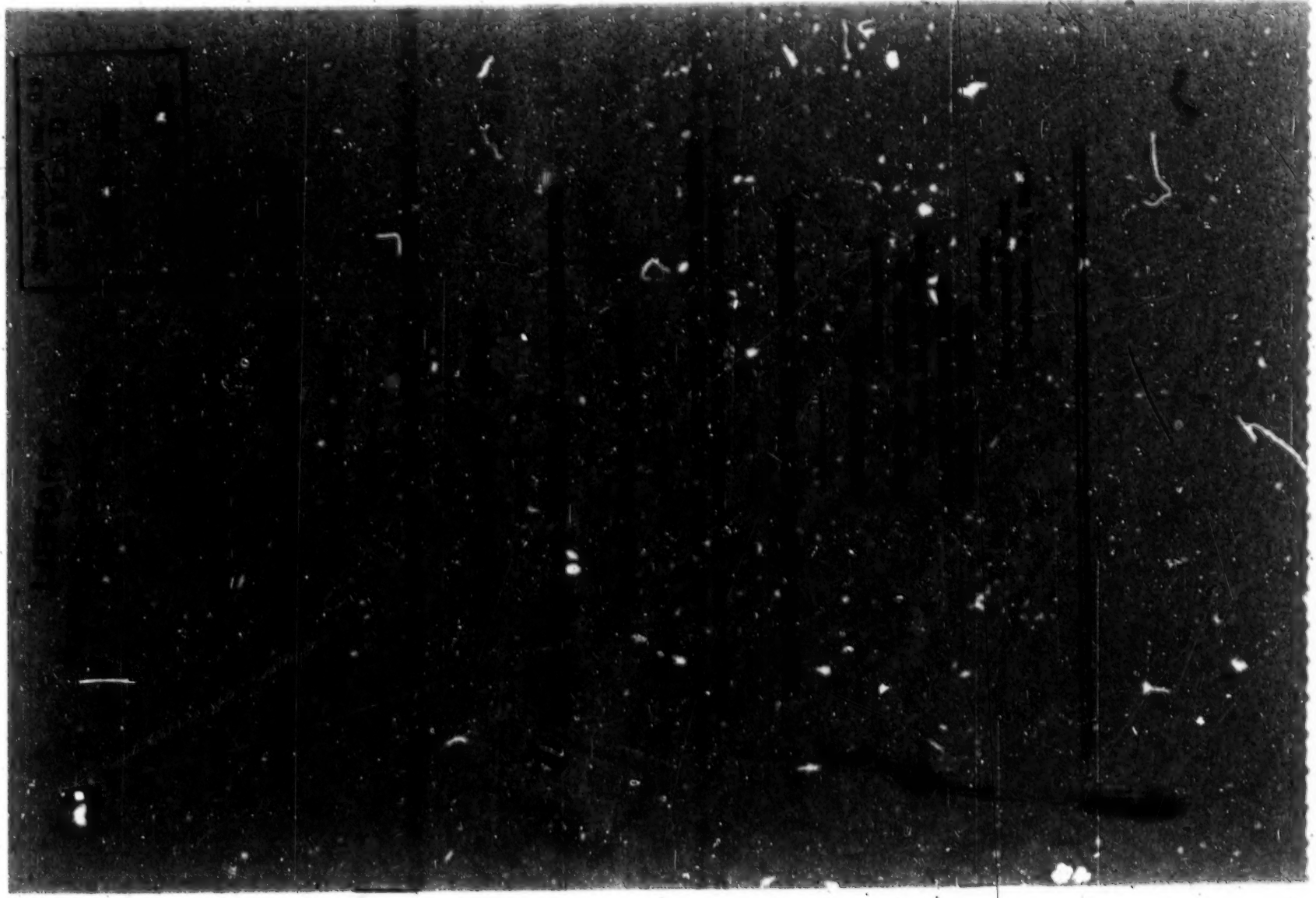

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 369

JOHN JOSEPH CRANE AND ROBERT B. SILLS, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 370

ROBERT ZANE AND HERBERT GILMORE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pets. No. 369 and No. 370, pp. 13–23) is reported at 316 F. 2d 907.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1963. A petition for rehearing was denied on June 15, 1963. On July 19, 1963, Mr. Justice Black extended the time for filing petitions for writs

of certiorari to and including August 14, 1963. The petitions were filed on August 13, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether consecutive sentences could properly be imposed on counts charging separate mailings to different victims in execution of a scheme to defraud and a scheme to sell securities by fraud.

2. Whether the district court properly denied a motion to suppress as evidence the books of a corporation which had been subpoenaed for examination by a State officer under a State statute and subsequently made available to the United States Attorney.

3. Whether the trial court erred in ruling that the prospective jurors had not seen any defendant in shackles and handcuffs.

STATUTES INVOLVED

Section 17(a) of the Securities Act of 1933, 48 Stat. 74, as amended, 68 Stat. 686 (15 U.S.C. 77q(a)) provides:

> It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light

of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Section 24 of the Securities Act of 1933 (15 U.S.C. 77x) provides:

> Any person who willfully violates any of the provisions of this title, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this title, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post

> Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Section 32.20 of the Florida Statutes provides:

> To have process—The county solicitor is allowed the process of his court to summon witnesses to appear before him in or out of term time, at such convenient places and time as may be designated in the summons, to testify before him as to any violation of the criminal law upon which they may be interrogated.

STATEMENT

Petitioners and two other individuals were charged in the United States District Court for the Southern District of Florida with various offenses resulting from a scheme to defraud. Counts 1, 2, 3 and 5 charged them with the use of the mails in the sale of securities (15 U.S.C. 77q); Counts 6 through 9 charged mailings in execution of a scheme to defraud (18 U.S.C. 1341); and Count 11 charged a conspiracy to commit these offenses (18 U.S.C. 371). Each substantive count named a different victim to whom a communication was sent, and the four overt acts of the conspiracy count submitted to the jury named four additional victims (R. 2339-2350). Two other counts (Counts 4 and 10) were dismissed by the court. Petitioners were convicted on all nine counts sub-

mitted to the jury. Each was sentenced to imprisonment for a total of eighteen years, the court imposing sentences of two years on each count to run consecutively (R. 2544–2548).

The sufficiency of the evidence is not challenged here. In brief, it showed that in 1959 and 1960, petitioners engaged in an organized scheme whereby they established a corporation, the Insured Capital Corporation, which purportedly sold its secured promissory notes to the public on representations that it used the funds to purchase secured chattel mortgages. In fact, the promissory notes were worthless with no secured backing and the proceeds were divided among the participants in the scheme.

Investors were attracted to the company by advertisements which stated that eight percent interest would be paid on their investments and that the principal amounts would be repaid in a year (*e.g.*, R. 117–119). When the investor went to the company offices, he would be told that the investment would be secured by collateral, generally auto loans, with a security valued at 20% more than the investment (*e.g.*, R. 380–381). The investor would be given collateral paper of no value (R. 811). The company would pay interest for a period of time but would not repay the principal (*e.g.*, R. 219). At the trial 19 victims testified that they had invested varying amounts ranging from $1,000 to $15,000 (R. 547, 552, 572, 650). The company had a paid capital of only $500 and its only income amounted to $84.68. Its books showed that it took in $241,308, repaying but $27,000 to its investors.

The books also revealed that approximately $176,000 in checks were made payable directly or indirectly to the company officers. (R. 794, 1700–1726).

ARGUMENT

1. It has long been settled that each separate use of the mails in execution of a scheme to defraud constitutes a separate offense under the mail fraud statute. *Badders* v. *United States*, 240 U.S. 391; *In re Henry*, 123 U.S. 372. This Court has rejected the argument, urged by petitioners, that the existence of a scheme to defraud makes the crime a continuous offense. Rather it has ruled that each mailing "consists of a single isolated act, and is repeated as often as the act is repeated." 123 U.S. at 374. These rulings have been consistently followed by the courts of appeal. See, *e.g.*, *Mitchell* v. *United States*, 142 F. 2d 480 (C.A. 10), certiorari denied, 323 U.S. 747; *Bozel* v. *United States*, 139 F. 2d 153 (C.A. 6), certiorari denied, 321 U.S. 800; *United States* v. *Hill*, 71 F. 2d 159 (C.A. 3). In this case, it is not even necessary to rely merely upon the separateness of the mailings. Here, not only were the mailings separate but each mailing was to a separate victim of the scheme to defraud.

The same ruling is applicable when the mailings are charged to violate the Securities Act of 1933 rather than the general mail fraud statute. See *Palmer* v. *United States*, 229 F. 2d 861, 867 (C.A. 10), certiorari denied, 350 U.S. 996. The history of the Securities Act does not indicate that Congress intended to differentiate between frauds in the purported sale of promissory notes and frauds in the

purported sale of items not constituting securities where the swindler merely uses this device as a means to funnel the money into his own pocket. See S. Rep. No. 47, 73d Cong., 1st Sess.; H. Rep. No. 85, 73d Cong., 1st Sess.

The Second Circuit has not held to the contrary, as petitioners contend. In *United States* v. *Cashin*, 281 F. 2d 669 (C.A. 2), in rejecting an argument that a prosecution could not be transferred for lack of venue to another district where there were no mailings, the court did state that the gist of the crime was the fraudulent scheme and not the mailings, but was not called upon to decide and did not rule on the question whether separate mailings constituted separate offenses under the securities statute.

Even if the gist of the crime under the Securities Act is not the separate mailings, the cumulative sentences imposed here were justified. Section 17(a)(3) of the Securities Act provides that it shall be unlawful for any person in the offer or sale of any securities "to engage in any transaction * * * which operates or would operate as a fraud or deceit upon the purchaser." These words indicate that Congress intended that each fraudulent transaction constitute a unit for purposes of prosecution. Each of the Securities Act counts alleges just such a separate fraud-

[1] It is true that several district court cases in that circuit have held that each separate use of the mails does not constitute a separate crime under the Securities Act. *United States* v. *Hughes*, 195 F. Supp. 795 (S.D.N.Y.); *United States* v. *Greenberg*, 30 F.R.D. 161 (S.D.N.Y.). But the decisions in the Southern District of New York have not been consistent. See *United States* v. *Van Allen*, 28 F.R.D. 329, 341-344 (S.D.N.Y.).

ulent transaction. Thus, each of the counts charged that the fraud was perpetrated upon a particular purchaser of a promissory note, different from the particular person singled out in the mail fraud counts and different from each other. Accordingly, petitioners received separate sentences for executing their fraudulent scheme on separate victims in separate transactions. The defrauding of one victim does not immunize petitioners from further punishment when they chose to utilize the same means to swindle others. The defrauding of each separate person is a separate transaction. Essentially this case is no different from one where separate punishments are imposed for different bank robberies or different larcenies employing the same method of operation.[2]

2. In October 1960, the books and records of the Insured Capital Corporation were subpoenaed from its then Secretary-Treasurer under a state statute, Fla. Stat. Ann. § 32.20, to be produced before the County Solicitor. The Secretary-Treasurer, with the assistance of deputy sheriffs, delivered the records to the Solicitor (R. 92–95, 179–180, 183–184). On October 27, 1960, a government accountant examined these records at the Solicitor's office (R. 278–280). In March 1962, shortly before the trial of this case, the Solicitor, assured that the records would be covered by a trial subpoena, turned over the records

[2] Petitioners also received a cumulative sentence of two years on the conspiracy count (count 11). Since the substantive offenses charged could have been committed by a single person, the conspiracy to commit those offenses is subject to separate punishment. *Pereira* v. *United States*, 347 U.S. 1; *Callanan* v. *United States*, 364 U.S. 587.

to a government accountant and a state agent (R. 240, 251, 256–257, 266). The Solicitor subsequently received a trial subpoena for the records (R. 262). At the trial, petitioners moved to suppress these records as evidence, alleging that the records had been illegally seized and that their use at the trial violated the privilege against self-incrimination (R. 89, 344–351). The trial court, in denying these motions, found, *inter alia*, that the books were legally acquired by the County Solicitor and by the United States Attorney (R. 343–344, 351).

The ruling of the trial judge, affirmed by the court below, was correct. Corporation books and records may properly be subpoenaed. They are not within the privilege against self-incrimination. *Wilson* v. *United States*, 221 U.S. 361; *Curcio* v. *United States*, 354 U.S. 118. Here the books were in fact subpoenaed under a state statute and were subsequently subpoenaed for the trial. The fact that the County Solicitor voluntarily turned them over to the government accountant for inspection prior to the issuance of the subpoena raises no substantial constitutional question in view of the fact that the books would have been producible under Rule 17(c), F.R. Crim. P.

3. There is no merit to petitioners' contention that the jury saw the defendants (other than petitioners Zane and Gilmore) in shackles and handcuffs. This contention was raised prior to the impanelling of the jury and the trial judge interrogated the three jurors who might have observed the petitioners when they were brought into the courtroom. These jurors denied that they saw petitioners (R. 18, 34–42).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1963.